UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SANDRA J. JACKSON, Appellant,	)	DOCKET NUMBERS CH-0752-95-0898-R-1 CH-0752-95-0694-R-1 CH-0752-95-0694-X-1 CH-0752-95-0898-P-1 CH-0752-95-0694-P-1
v.	)	
UNITED STATES POSTAL SERVICE Agency.	)	DATE: JUN 26, 1998

Sandra Jackson, Chicago, Illinois, pro se.

Phyllis Lingenfelser, Bloomingdale, Illinois, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The agency determined that the appellant was physically unable to perform the duties of her PS-3 Custodial Laborer position because of an allergic condition (chemically-induced dermatitis from cleaning agents); placed her on enforced leave effective July 12, 1994, for physical inability to perform; and removed her

effective February 24, 1995, for that reason. *See Jackson v. U.S. Postal Service*, 73 M.S.P.R. 512, 514-16 (1997). In a February 26, 1997 Opinion and Order, the Board did not sustain the constructive suspension for the period October 16, 1994, to February 24, 1995, and it did not sustain the removal. *See id.* at 514. Regarding the removal action, the Board found that the agency had discriminated against the appellant because it failed to prove that reassigning the appellant to another position would be an undue hardship. *See id.* at 518-25. Regarding the constructive suspension, the Board affirmed the administrative judge's finding that the agency took that action without according the appellant due process. *See id.* at 514. The Board ordered the agency to cancel the constructive suspension and the removal action; to restore the appellant effective October 16, 1994; and to reassign her "effective February 25, 1995 to [a] Mail Processor position or to another position in the agency that is at or below her grade, within the commuting area, within her medical restrictions, and vacant at the time of the agency decision." *Id.* at 514, 525-26.

In her July 28, 1997 compliance initial decision, the administrative judge reviewed the record evidence showing the availability of positions at the time of the appellant's removal and found that the only positions available at the PS-3 level or below were custodial positions, which the appellant was physically unable to perform. *See* Compliance Initial Decision (CID), *Jackson v. U.S. Postal Service*, MSPB Docket Nos. CH-0752-95-0898-C-1, CH-0752-95-0694-C-1, Tab 28 at 2-3 (July 28, 1997). The administrative judge further found that the agency was under no obligation, under 29 C.F.R. § 1614.203(g), to create a PS-3 position for the appellant. *See id.* at 3. She also found that the Summer Intern program, a three-month program limited to college students, was not available to the appellant because she was not a student. *Id.* The administrative judge concluded that because no position existed as described by the Board in its February 26, 1997 Order, the agency is unable to comply with that Order. *See id.*

The administrative judge also found that because, as determined in the Board's February 26 decision, the appellant was unable to work in her PS-3 Custodial Laborer position, she was not ready, willing and able to perform the duties of her position or any vacant position; thus, she was not entitled to back pay. *See id.* at 4.

In her July 28, 1997 initial decision regarding compensatory damages, the administrative judge found that the appellant made only "bare allegations" of damages and had failed to produce evidence sufficient to support her claim. *See* Compensatory Damages File, *Jackson v. U.S. Postal Service*, MSPB Docket Nos. CH-0752-95-0898-P-1, CH-0752-95-0694-P-1, Tab 12 at 5. Accordingly, the administrative judge held that an award of compensatory damages is not allowable. *Id.*

The agency has filed a brief in response to the administrative judge's compliance initial decision, and the appellant has filed a petition for review of the compensatory damages initial decision. For the reasons set forth below, we JOIN the compliance case and the compensatory damages cases; REOPEN the removal appeal and JOIN it with the compensatory damages and compliance cases; REAFFIRM, as MODIFIED, our February 26, 1997 opinion; SUSTAIN the appellant's removal; AFFIRM the compliance initial decision on the constructive suspension; and DISMISS the compliance and compensatory damages cases.

ANALYSIS

As explained below, developments following our prior decision on the merits of this appeal and a reanalysis of the applicable law lead us to reopen the case and reverse our finding of discrimination.

The reopening issue

Congress explicitly granted the Board the full authority to reopen any decision on our own motion. See 5 U.S.C. § 7701(e)(1)(B). This authority was implemented in 5 C.F.R. § 1201.118, which provides that the Board "may reopen

an appeal and reconsider a decision of a judge on its own motion at any time, regardless of any other provisions of this part." *See also Stevenson v. Department of Defense*, 55 M.S.P.R. 625, 629 (1992).

The Federal Circuit has stated that "'[w]henever a question concerning administrative ... reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other.'" *Azarkhish v. Office of Personnel Management*, 915 F.2d 675, 679 (Fed. Cir. 1990) (citation omitted). On this point, the Board has said that it will not turn a blind eye to a clear and material legal error. *Robinson v. Department of Veterans Affairs*, 72 M.S.P.R. 444, 449 (1996).

In deciding whether to reopen a final decision *sua sponte*, the Board will also consider the amount of time that elapsed between the issuance of the decision and the filing that brought the apparently erroneous holding to our attention. *See id.* at 448-49. Here, the Board issued its final decision on February 26, 1997, and the agency filed argument and evidence on April 11, 1997, indicating that, at the time of the appellant's removal, no PS-3 Mail Processor positions existed, and that there were no vacant positions at or below grade level PS-3, except for custodial positions which the appellant could not perform because of her medical condition. *See* Compliance File (CF), MSPB Docket Nos. CH-0752-95-0898-C-1, CH-0752-95-0694-C-1, Tab 6, Exs. E, F, G, H. This period of time (about six weeks) falls within the time period considered reasonable in other cases involving reopening of appeals. *See Robinson*, 72 M.S.P.R. at 449 (6-month, 13-month, and 18-month periods were not considered unreasonably long periods of time for purposes of reopening). Accordingly, we find that reopening and reconsideration of this appeal is warranted under the principles governing the Board's authority to reopen decisions on its own motion.

The discrimination issues

Following the analytical framework used by the administrative judge, the Board in its prior decision reviewed the evidence under the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981), to find that the appellant made out a prima facie case of disability discrimination and had proven her affirmative defense. *See Jackson*, 73 M.S.P.R. at 520. The Board held that the administrative judge "correctly concluded that the appellant satisfied the first two elements of a prima facie case (that she is a "handicapped person" under 29 C.F.R. § 1614.203(a) and that the removal is based on the disability)," but that the administrative judge "erred in finding that the appellant failed to satisfy the third element, articulation of a reasonable accommodation." *Id*. The Board then found that the appellant had articulated a reasonable accommodation, in particular, she had been "examined for fitness for duty as a Mail Processor," and the examining physician had concluded that she "could perform the job with only two restrictions ('no contact with chemicals; wear well-ventilated shoes')." *Id.* at 521. The Board stated: "We find that this constitutes a prima facie showing by the appellant of an ability to perform the essential functions of the job with some reasonable accommodation." *Id.*

Our legal analysis was flawed, however, because it failed to take into account that at the stage of the administrative proceeding at which the Board reviewed the case, the order for presentation of evidence and allocation of the burden of production was no longer at issue. Thus, in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478 (1983), the Supreme Court stated that when a case is past that stage of the proceedings where the parties have presented their evidence on the discrimination issue, the

rebuttable presumption created by the establishment of a prima facie case "'drops from the case.'" *Id.* at 715, 103 S. Ct. 1481. In *Aikens*, the Supreme Court stated:

> By establishing a prima facie case, the plaintiff in a Title VII action creates a rebuttable "presumption that the employer unlawfully discriminated against" him. To rebut this presumption, "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." In other words, the defendant must "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason."
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> But when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption "drops from the case," and "the factual inquiry proceeds to a new level of specificity." ... The District Court [is] then in a position to decide the ultimate factual issue in the case.
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> The "factual inquiry" in a Title VII case is "[whether] the defendant intentionally discriminated against the plaintiff." ... The prima facie case method established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant[;] [t]he district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff."

Id. at 714-15, 103 S. Ct. at 1481-82 (citations and footnotes omitted).

The Court reiterated this principle in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993), stating that once the employer introduced evidence to rebut the employee's prima facie case, "the shifted burden of production became irrelevant." *Id.* at 507, 113 S. Ct. at 2747 (citations omitted).

At that point, the "presumption, having fulfilled its role of forcing the [employer] to come forward with some response, simply drops out of the picture," and the trier of fact should decide, on the full record, whether the employee has met her ultimate burden of persuasion that the employer discriminated -- a burden which, the Court noted, "remains at all times" with the employee. *Id.* at 507, 511, 113 S. Ct. at 2747, 2749.

Following *Aikens* and *Hicks*, the Equal Employment Opportunity Commission (EEOC) has held that, where the record is complete and a hearing has been held, it is unnecessary to follow the traditional burden-shifting order of analysis; rather, "the inquiry shifts from whether the complainant has established a prima facie case to whether s/he has demonstrated by a preponderance of the evidence that the agency's reason for its actions was a pretext for discrimination." *Pierce v. Social Security Administration*, EEOC Appeal No. 01961642, slip op. at 2 (Feb. 20, 1998); *see also Jeffries v. Department of the Treasury*, EEOC Appeal No. 01962760, slip op. at 2 (Mar. 10, 1998) ("where the record is fully developed ... the factual inquiry can proceed directly to ... the ultimate issue of whether appellant has shown by a preponderance of the evidence that her termination was motivated by discrimination, and whether the proffered explanation is the true reason for the agency's action or merely a pretext for discrimination," citing *Aikens* and *Hicks*). The EEOC and courts have adopted and applied Title VII burdens of proof to disability discrimination cases. *See Kutyna v. National Aeronautics & Space Administration*, EEOC Appeal No. 01944637, slip op. at 3 (Dec. 4, 1995), and cases cited therein.

In a disability discrimination case where the appellant seeks some form of accommodation, her prima facie case consists of a showing that she is a disabled person, and that the action appealed was based on her disability, and, to the extent possible, she must articulate a reasonable accommodation under which she believes she could perform the essential duties of her position or of a vacant

funded position to which she could be reassigned. *See Sheehan v. Department of the Navy*, 66 M.S.P.R. 490, 493 (1995); *Savage v. Department of the Navy*, 36 M.S.P.R. 148, 151-52 (1988). In disability discrimination cases, as in Title VII cases, once the agency submits evidence to rebut the appellant's prima facie showing of discrimination, the prima facie case "'drops from the case,'" and the appellant bears the ultimate burden of proving that she was the victim of prohibited discrimination. *Halperin v. Abacus Technology Corp*. 128 F.3d 191, 196 (4th Cir. 1997) (quoting and citing *Burdine* and *Hicks*); *see also Snow v. Ridgeview Medical Center*, 128 F.3d 1201, 1206 (8th Cir. 1997); *Brown v. Runyon*, EEOC Appeal No. 01943606, slip op. at 4 (Oct. 2, 1995).

Neither party has ever argued that the record was not fully developed when we issued our February 26, 1997 Opinion and Order. *Cf. McDonnell Douglas*, 411 U.S. at 807, 93 S. Ct. at 1826-27 (the Court agreed with the employee that he was not afforded a fair opportunity to introduce evidence that the employer's stated reason for its refusal to reemploy him was a pretext for discrimination). But rather than engaging in a burden-shifting analysis, we should have instead reviewed the evidence to determine whether the appellant had met her burden of proving that the agency failed to offer her a vacant funded position that she could perform and which was at or below her current grade or level and in her commuting area, as required by 29 C.F.R. § 1614.203(g).[1] *See* 73 M.S.P.R. at 521. On reopening, we find, as explained below, that the appellant did not meet her burden.

Before discussing the ultimate question of whether the agency engaged in prohibited discrimination, we reaffirm our prior holding that an agency has an

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[1] Under 29 C.F.R. § 1614.203(g), an agency's reassignment obligation extends only to "a funded vacant position, located in the same commuting area and serviced by the same appointing authority, and at the same grade or level."

obligation under 29 C.F.R. § 1614.203(g) to identify vacant funded positions in the same commuting area, at or below the employee's current grade or level, to which a disabled employee can be reassigned. *See Jackson*, 73 M.S.P.R. at 521. We also reaffirm our prior holding that the collective bargaining agreement did not relieve the agency of its obligations under section 1614.203(g). *See Jackson*, 73 M.S.P.R. at 524. However, we clarify that if the agency fails to meet its reassignment obligation before it removes the employee, the agency's failure at that time to look for a position as a reasonable accommodation does not relieve the appellant of her burden of ultimately showing, before the Board, that such positions existed and were available. *See, e.g., Gonzagowski v. Widnall*, 115 F.3d 744, 748-49 (10th Cir. 1997); *Shiring v. Runyon*, 90 F.3d 827, 832 (3d Cir. 1996); *Robinson v. Runyon*, 987 F. Supp. 620, 622 (N.D. Ohio 1997).

As indicated in the Board's prior decision, the appellant identified no vacant funded positions at or below a PS-3 level which she could perform. *See id.* at 521. Nor did the appellant establish that there were any Mail Processor positions graded at level PS-3 or below. *See id.* As in our previous decision, we acknowledge the agency's claim that it could not assign the appellant to any of the positions she suggested because they all were at a PS-4 grade level or higher.[2]

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[2] The administrative judge also noted evidence put into the record on compliance showing that no such positions existed, for example, a signed sworn affidavit from Leanne K. Bedere, Human Resources Specialist, Great Lakes area, that there were, at the time of the appellant's removal and also at the time of the compliance action, no PS-3 Mail Processor positions. *See* CF, Tab 13, Ex. PP. Additionally, the agency submitted evidence that at the time of the appellant's removal, there were no vacant positions at or below PS-3, except for custodial positions. *See id.*, Tab 6, Exs. E, F, G, H; Tab 13, Ex. QQ; and Tab 26, Ex. XX. The appellant has made no claim or introduced no evidence to the contrary.

We also note that even though the agency ordered the appellant to a fitness-for-duty examination for a Mail Processor job, this does not satisfy her

See id. at 522 n.9. We conclude here, however, that although the agency may not have fulfilled its obligation to look for a position to which the appellant could be reassigned, the appellant did not meet her ultimate burden of proving that there was a position the agency would have found and could have assigned her to if it had looked.

Conclusion

Accordingly, we reverse our finding that the agency discriminated against the appellant, and we sustain the agency's removal action. Having sustained the removal action, we dismiss the compliance case relating to that action. We also dismiss the compensatory damages cases since, absent a finding of discrimination, the appellant has no entitlement to such damages. *See Yates v. U.S. Postal Service*, 70 M.S.P.R. 172, 180-81 (1996).

Finally, we leave intact our affirmance of the administrative judge's finding that the appellant was constructively suspended for the period October 16, 1994, to February 24, 1995, and that the agency's action for that period must be canceled for lack of due process. *See Jackson*, 73 M.S.P.R. at 514-15. Nonetheless, we affirm the administrative judge's finding in her compliance initial decision that the appellant is not entitled to back pay for that period of time.

In our prior decision, we found no error in the administrative judge's finding that the agency placed the appellant on enforced leave for the period

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burden of proving that any Mail Processor positions existed at a grade level PS-3 and were vacant, particularly since the agency's evidence showed that Mail Processor positions were graded at a level no lower than PS-4. *See id.* at 522 & n.9. *Cf, e.g., Crutchfield v. Department of the Navy*, 73 M.S.P.R. 444, 447 (1997) (the Board declined to engage in speculation as to what the appellant's leave balance would have been if certain past events had occurred, but instead took her leave balance as it actually existed at the time she made her request for leave).

October 16, 1994, to February 24, 1995, because her physical impairment rendered her unable to perform the duties of her PS-3 Custodial Laborer position. *See* 73 M.S.P.R. at 517. We also noted that the appellant did not challenge that finding on petition for review. *See id.*

The administrative judge found in her compliance initial decision that there were no vacant funded positions at or below the PS-3 level to which the appellant was entitled under 29 C.F.R. § 1614.203(g) for the period of the enforced leave. *See* CID at 3-4. The appellant does not contest that finding. *See* Compliance Referral File, MSPB Docket Nos. CH-0752-95-0898-X-1, CH-0752-95-0694-X-1, Tabs 3 & 4. Indeed, as discussed above, the appellant did not prove that any such positions existed at the time of her removal, and the agency's evidence on compliance (discussed in footnote 2 above) shows that there were no such positions available during the period of the constructive suspension that immediately preceded the removal. Under these circumstances, we affirm the administrative judge's finding that the appellant was not ready, willing and able to work in her PS-3 Laborer Custodial position or any vacant funded position at or below a PS-3 grade level for the period October 16, 1994, to February 24, 1995, and that she is entitled to no back pay for that period. *Cf., e.g., Hey v. U.S. Postal Service*, 60 M.S.P.R. 521, 523 (1994) (where the agency submitted evidence of compliance and the appellant did not dispute that evidence, the Board found the agency in compliance).

ORDER

This is the final order of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request further review of the Board’s final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal

if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.